PACIFIC & ORIENT INSURANCE CO BHD v. KAMACHEH KARUPPEN

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
MOHTARUDIN BAKI JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: P-04-40-02-2014]
6 MARCH 2015

ROAD TRAFFIC: *Insurance – Third party claims – Judgment against insured by third party – Whether third party could claim against insurer upon failure by insured to satisfy judgment sum – Whether s. 96 Road Transport Act 1987 created statutory obligation against insurer to pay third party*

INSURANCE: *Motor insurance – Construction of policy – Whether insurer ought to be held liable to pay third party whose injuries were caused by criminal use of vehicle by insured – Road Transport Act 1987, s. 91(1)(b) – Whether restricted insurer's liability to only where vehicle used for purpose within contemplation of insurer*

INSURANCE: *Third party rights against insurer – Claim under policy – Third party obtained judgment against insured – Third party claimed against insurer upon failure by insured to satisfy judgment sum – Whether s. 96 Road Transport Act 1987 created statutory obligation against insurer pay third party – Insured vehicle used for criminal purpose – Whether defeated third party's claim – Whether insurer satisfied conditions for avoidance of payment – Road Transport Act 1987, s. 96(2) & (3)*

WORDS AND PHRASES: *'use' – Road Transport Act 1987, s. 91(1)(b) – Whether covered use of vehicle in commission of criminal act*

The respondent fell off her motorcycle and sustained injuries when she was trying to resist the person who was trying to snatch her handbag. The person who tried to snatch her handbag was a pillion rider on the motorcycle PHT 7756 ridden by the son of the insured. The son of the insured was authorised by the insured to ride the motorcycle PHT 7756 which was covered by the appellant. The pillion rider and the son of the insured were charged in the criminal court under s. 391 of the Penal Court and was convicted and sentenced accordingly. The respondent filed a civil claim against the pillion rider and the son of the insured and obtained a judgment in default against both of them. However, when no payment was made by either the pillion rider or the son of the insured, the respondent sent the sealed copy of the judgment to the appellant and when no payment was forthcoming from the appellant, the respondent commenced a recovery action against the appellant under s. 90 of the Road Transport Act 1987 ('RTA'). It was the respondent's case that the appellant as the admitted insurer was liable to pay the respondent as the third party that had suffered injuries as a result of the use

of the motorcycle PHT 7756 on the road. The Sessions Court allowed the respondent's action which was affirmed by the High Court. Hence, the appeal. The issues for the court's determination in the present appeal were: (i) whether the insurer, the appellant, ought to be held liable to pay the third party, the respondent, whose injuries had been caused by the criminal use of the vehicle by the insured; and (ii) whether the General Exception 3(a) of the insurance policy could be relied upon by the appellant to prevent the respondent from enforcing the judgment. It was the appellant's contention that the criminal act of the insured was not something caused by or arising out of the use of the motor vehicle.

Held (dismissing appeal with costs)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The right of the respondent as a third party to approach the court for redress against the appellant, who itself was not a tortfeasor and with whom the respondent had no contractual relationship, arose from statutory empowerment under s. 96 of the RTA. The mechanism of s. 96 of the RTA operates thus: there is a statutory obligation created by s. 96 of the RTA on the part of the insurer on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and is an exception to the concept founded upon privity of contract. (para 17)

(2) The pertinent words under s. 91(1)(b) would be 'any liability which may be incurred ... in respect of death of or bodily injury ... caused by or arising out of the use of the motor vehicle...'. It cannot be said that the wordings of the RTA restricts the third party claimants' rights only to any liability wherein the use of the vehicle is one within the contemplation of the insurer. The phrase in s. 91(1)(b) would include the liability for damages arising from acts of a criminal nature. The irresistible conclusion would be that the appellant was liable to pay the third party who had suffered injuries as a result of the use of the motor vehicle which was insured by the appellant regardless whether it was at the time used for a criminal purpose. (para 36)

(3) The injuries suffered by the respondent in the instant case arose out of the use of the motorcycle by the insured. The liability of the insured to the respondent fell within the ordinary meaning of the words used in s. 9(1)(b). The expression 'use' must be interpreted to mean not only the act driving of the vehicle but also having the use of the vehicle on the road. Ascribing some other meaning to it to say that this does not cover the use of the vehicle in the commission of a criminal act will defeat the very statutory protection accorded to the third party *vide* the RTA. The appellant was therefore liable to pay the respondent who had suffered

injuries as a result of the use of the motor vehicle which was insured by the appellant regardless that it was at the time used for a criminal purpose. (paras 37 & 46)

(4) Section 96(1) imposes upon the insurer the obligation of paying to the person who had obtained judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is effected in respect of any third part risk covered under the policy. The appellant in the present appeal was obliged statutorily to pay the respondent who had obtained the judgment against the insured and therefore, it was the insurer's mandatory duty to satisfy the judgment. (para 38)

(5) The appellant would be able to avoid the payment obligation under the circumstances and conditions mentioned in sub-ss. (2) and (3) of s. 96 of the RTA *ie*, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void and unenforceable. However, none of the conditions were fulfilled by the appellant to exonerate its statutory obligation under the policy. (paras 39 & 40)

(6) Sections 94 and 95 of the RTA prohibited an insurer from relying on certain terms in an insurance policy for the purposes of excluding liability. Section 95(k) of the RTA specifically stated that an insurer cannot rely on any conditions which purports to restrict the insurance of the persons insured by reference to the matters set out therein, *inter alia*, that the motor vehicle was being used for a purpose other than the purpose stated in the policy. Hence, the insurer could not impose such terms and conditions on their insurance policy that would be contrary to RTA as was done in the General Exception 3(a) of the policy. (paras 41-43)

Bahasa Malaysia *Translation Of Headnotes*

Responden terjatuh dari motorsikalnya dan mengalami kecederaan apabila dia mencuba untuk melawan orang yang cuba meragut beg tangannya. Orang yang mencuba untuk meragut beg tangannya adalah pembonceng motorsikal PHT 7756 yang ditunggang oleh anak kepada pengambil insurans. Anak pengambil insurans diberi kuasa oleh pengambil insurans untuk menunggang motorsikal PHT 7756 tersebut yang dilindungi oleh perayu. Pembonceng dan anak pengambil insurans telah dipertuduh di mahkamah jenayah di bawah s. 391 Kanun Keseksaan dan disabitkan dan dihukum sewajarnya. Responden memfailkan tuntutan sivil terhadap pembonceng dan anak

pengambil insurans dan memperoleh penghakiman ingkar terhadap kedua-dua mereka. Walau bagaimanapun, apabila tiada bayaran dibuat oleh pembonceng atau anak pengambil insurans, responden menghantar salinan meterai penghakiman tersebut kepada perayu dan apabila tiada bayaran dibuat oleh perayu, responden memulakan tindakan untuk mendapatkan semula bayaran terhadap perayu di bawah s. 90 Akta Pengangkutan Jalan 1987 ('APJ'). Adalah kes responden bahawa perayu sebagai penanggung insurans yang diakui adalah bertanggungan untuk membayar kepada responden sebagai pihak ketiga yang telah mengalami kecederaan akibat penggunaan motorsikal PHT 7756 di atas jalanraya. Mahkamah Sesyen membenarkan tindakan responden yang disahkan oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan mahkamah dalam rayuan ini adalah: (i) sama ada penanggung insurans, perayu, wajar bertanggungan untuk membayar kepada pihak ketiga, responden, yang kecederaannya telah diakibatkan oleh penggunaan secara jenayah kenderaan yang diinsuranskan; dan (ii) sama ada perayu boleh bergantung kepada Pengecualian Am 3(a) polisi insurans boleh disandarkan oleh perayu untuk menghalang responden daripada menguatkuasakan penghakiman tersebut. Hujahan perayu adalah bahawa tindakan jenayah pengambil insurans bukan sesuatu yang diakibatkan atau disebabkan oleh penggunaan kenderaan bermotor tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Hak responden sebagai pihak ketiga untuk menuntut melalui mahkamah terhadap perayu, yang bukan pelaku salah dan yang dengannya responden tidak mempunyai hubungan kontrak, timbul daripada pemberian kuasa di bawah s. 96 APJ. Mekanisme s. 96 APJ oleh itu berfungsi: wujud kewajipan statutori yang dibentuk oleh s. 96 APJ pada pihak penanggung insurans selepas diberikan notis mengenai kegagalan pengambil insurans untuk membayar jumlah penghakiman yang pengambil insurans gagal penuhi bagi pihak ketiga. Kewajipan membayar ini adalah bersifat statutori dan adalah pengecualian kepada konsep yang diasaskan oleh priviti kontrak.

(2) Perkataan-perkataan penting di bawah s. 91(1)(b) adalah 'apa-apa liabiliti yang ditanggung ... berkenaan dengan kematian atau kecederaan tubuh badan ... yang disebabkan oleh atau yang timbul daripada penggunaan kenderaan bermotor itu ....'. Ia tidak bleh dikatakan bahawa perkataan-perkataan dalam APJ mengehadkan hak tuntutan penuntut pihak ketiga hanya kepada liabiliti di mana penggunaan kenderaan tersebut adalah dalam tekaan penanggung insurans. Frasa dalam s. 91(1)(b) adalah termasuk liabiliti untuk kerugian yang diakibatkan oleh tindakan-tindakan yang bersifat jenayah. Kesimpulan yang tidak boleh disangkal adalah bahawa perayu bertanggungan untuk membayar

pihak ketiga yang telah mengalami kecederaan akibat penggunaan kenderaan bermotor yang telah diinsuranskan oleh perayu tanpa mengira sama ada ia telah pada masa tersebut digunakan untuk tujuan jenayah.

(3) Kecederaan yang dialami oleh responden dalam kes ini berbangkit daripada penggunaan motorsikal oleh pengambil insurans. Liabiliti pengambil insurans kepada responden terangkum dalam maksud lazim perkataan-perkataan yang digunakan dalam s. 91(1)(b). Perkataan 'use' mesti ditafsirkan untuk membawa maksud bukan hanya tindakan memandu kenderaan tetapi menggunakan kenderaan tersebut di atas jalan. Memberikan maksud lain untuk menyatakan bahawa ia tidak melindungi penggunaan kenderaan dalam melakukan tindakan jenayah akan menafikan perlindungan statutori yang diberikan kepada pihak ketiga melalui APJ. Oleh itu, perayu adalah bertanggungan untuk membayar responden yang telah mengalami kecederaan akibat penggunaan kenderaan bermotor tersebut yang telah diinsuranskan oleh perayu tanpa mengira bahawa ia telah digunakan bagi tujuan jenayah pada masa itu.

(4) Seksyen 96(1) meletakkan terhadap penanggung insurans tanggungjawab untuk membayar kepada orang yang telah memperoleh penghakiman terhadap penanggung insurans, selepas sijil insurans telah diserahkan dengan sewajarnya kepada orang yang diinsuranskan berkaitan dengan apa-apa risiko pihak ketiga yang dilindungi di bawah polisi tersebut. Perayu dalam rayuan ini bertanggungjawab secara statut untuk membayar kepada responden yang telah memperoleh penghakiman terhadap pengambil insurans dan oleh itu, adalah kewajipan mandatori untuk memenuhi penghakiman.

(5) Perayu boleh mengelak daripada kewajipan membayar di bawah keadaan dan syarat-syarat yang disebut dalam sub-ss. (2) dan (3) APJ iaitu, di mana notis yang diperlukan bagi prosiding tidak diberikan kepada penanggung insurans sebelum permulaan prosiding tersebut; di mana terdapat penggantungan penghakiman sementara menunggu rayuan; di mana polisi insurans berkaitan liabiliti tersebut telah dibatalkan; dan di mana penanggung insurans telah memperoleh deklarasi daripada mahkamah bahawa insurans tersebut adalah terbatal dan tidak boleh dikuatkuasakan. Walau bagaimanapun, tiada satu pun syarat-syarat tersebut telah dipenuhi oleh perayu untuk melepaskan kewajipan statutorinya di bawah polisi tersebut.

(6) Seksyen 94 dan 95 APJ menghalang penanggung insurans daripada menyandar atas terma-terma tertentu dalam polisi insurans bagi tujuan mengelakkan liabiliti. Seksyen 95(k) APJ secara spesifik menyatakan bahawa penanggung insurans tidak boleh menyandar atas apa-apa syarat yang bertujuan untuk menghalang insurans orang yang diinsuranskan

melalui rujukan kepada perkataan yang dikemukakan di dalamnya, antara lain, bahawa kenderaan bermotor tersebut digunakan bagi tujuan selain daripada tujuan yang dinyatakan dalam polisi tersebut. Oleh itu, penanggung insurans tidak boleh meletakkan terma-terma dan syarat-syarat sedemikian dalam polisi insurans mereka yang akan bertentangan dengan APJ seperti yang dilakukan dalam Pengecualian Am 3(a) polisi tersebut.

Case(s) referred to:
Ahmad Sandara Lela Putera & Anor v. Queensland Insurance Co Ltd [1974] 1 LNS 4 HC ***(refd)***
Dunthorne v. Bentley And Others [1996] RTR 428 ***(refd)***
Gardner v. Moore and Another [1984] 2 WLR 714 ***(refd)***
Hardy v. Motor Insurers Bureau [1964] 2 QB 745 ***(refd)***
Herbert v. Railway Passengers Assurance Co [1938] 1 All ER 650 ***(refd)***
Letchumi & Anor v. The Asia Insurance Co Ltd [1972] 1 LNS 74 FC ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Ramlah Abdullah v. Talasco Insurance Sdn Bhd & Anor [2009] 3 CLJ 620 CA ***(refd)***
Tan Keng Hong & Anor v. Fatimah Abdullah & Ors [1974] 1 LNS 166 FC ***(refd)***

Legislation referred to:
Penal Code, s. 391
Road Transport Act 1987, ss. 90, 91(1)(b), 94, 95(k), 96(2)
Road Transport Act 1960 [UK], s. 203(3)(a)
Road Transport Act 1988 [UK], s. 145(3)(a)

Other source(s) referred to:
S Santana Dass, *The Law of Motor Insurance,* p 230

For the appellant - Siva Ganesh; M/s K Suganthi & Co
For the respondent - R Subramaniam (KT Rajah Naidu with him); M/s Subra & Partners

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12B-286-2012]

Reported by S Barathi

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] This is an appeal against the decision of the High Court in affirming the judgment of the Sessions Court in allowing the respondent's recovery action against the appellant under s. 90 of the Road Transport Act 1987 (RTA 1987).

[2] We heard the appeal on 21 August 2014. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

Background Facts

[3] The background facts of the case is well narrated by the learned High Court Judge, which are as follows. On 19 March 2009, the respondent, Kamacheh a/p Karuppen was riding her motorcycle PHW 117 along a public road from Batu Ferringhi heading towards her house. While riding near Pantai Miami, out of a sudden, someone on another motorcycle PHT 7756 tried to snatch her handbag from behind. She tried to resist and as a result of which she fell off her motorcycle and sustained injuries.

[4] The person who tried to snatch her handbag was a pillion rider on the other motorcycle PHT 7756 that was ridden by the son of the insured. The son of the insured was authorised by the insured to ride the motorcycle no. PHT 7756 which was covered by the Pacific & Orient Insurance Co Berhad (appellant).

[5] The pillion rider and the son of the insured were charged in the criminal court for an offence under s. 391 of the Penal Code. They were convicted and sentenced accordingly.

[6] At the same time the respondent filed a civil claim against the pillion rider and the son of the insured in the Georgetown Sessions Court. A notice under s. 96(2) of the RTA 1987 was served on the appellant as the insurer of motorcycle PHT 7756. The appellant acknowledged receipt of the same.

[7] Initially, the appellant as the insurer had appointed counsel to represent the pillion rider and the son of the insured in the civil claim. However after realising that the insured had breached the terms and conditions of the insurance policy, the appellant had repudiated the insurance policy *vide* Notice of Repudiation dated 2 June 2010 (exh. D11). The appellant then withdrew its counsel from acting for the pillion rider and the son of the insured.

[8] On 15 March 2011, the respondent obtained a judgment in default against both the pillion rider and the son of the insured. Damages were assessed by the Sessions Courts in the sum of RM219,112.

[9] As no payment was made either by the pillion rider or the son of the insured, the respondent then sent the sealed copy of the judgment to the appellant. When no payment was forthcoming from the appellant, the respondent commenced with this recovery action against the appellant under s. 90 of the RTA 1987.

[10] The recovery claim was for a sum of RM219, 112 being the sum that was ordered by the Sessions Court to be paid to the respondent by the pillion rider and the son of the insured. It was the respondent's case that the appellant as the admitted insurer was liable to pay to the respondent being the third party that had suffered injuries as a result of the use of motorcycle PHT 7756 on the road which was insured by the appellant.

A **At The Sessions Court**

[11] After hearing the evidence from the witnesses called by both parties, the learned Sessions Court Judge found that the appellant was liable to pay the sum RM219,112 that was awarded to the respondent. The learned Sessions Court Judge held as follows:

B

> Seksyen 96 APJ mengenakan ke atas penanggung insuran kewajipan membayar kepada orang yang telah memperolehi Penghakiman terhadap yang diinsur (pembeli insuran), selepas sijil insuran disampaikan kepada orang yang berkenaan berkaitan mana-mana risiko pihak ketiga yang dilindungi di bawah polisi. Oleh itu Perayu/Defendan yang merupakan
> C penanggung insuran (penginsur) adalah diwajibkan secara statutory untuk membayar Plaintif yang telah memperolehi Penghakiman tersebut. Penanggung insuran hanya boleh elak kewajipan membayar di dalam keadaan dan syarat-syarat yang disebut di dalam seksyen 96(2) dan (3) APJ. Tiada pengecualian boleh diguna pakai untuk membenarkan Defendan mengelak kewajipan statutorinya ke atas polisi.

D

[12] Further, the learned Sessions Court Judge held:

> Memutuskan bahawa polisi insuran melindungi pihak ketiga (Plaintif) yang mengalami kecederaan akibat kegunaan kenderaan yang diinsur untuk melakukan jenayah di atas jalanraya. Plaintif yang mengalami
> E kecederaan akibat dari kegunaan m/sikal oleh yang diinsur untuk melakukan jenayah di atas jalanraya di mana defendan adalah penginsur (penanggung insuran), adalah dilindungi oleh polisi insuran tersebut. Defendan yang merupakan penanggung insuran adalah diwajibkan secara statutori untuk membayar Plaintif yang telah memperolehi penghakiman tersebut mengikut seksyen 96 APJ 1987.

F **At The High Court**

[13] Aggrieved by the decision of the learned Sessions Court Judge attaching liability against it in respect of payment of the sum that had been assessed by the Sessions Court, the appellant appealed to the High Court.

G **[14]** The learned High Court Judge affirmed the decision of the learned Sessions Court Judge. The learned High Court Judge held that the Sessions Judge was correct when he ruled that there is a statutory obligation created by s. 96 of the RTA 1987 on the part of the appellant being the insurer on being so notified on the failure of the insured to pay up the judgment sum
H that the insured had failed to satisfy in favour of the respondent. This duty to pay up is statutory in origin and is an exception to the concept founded upon privity of contract. The appellant as the insurer could not have the liberty to exclude this statutory requirement to insure against unlawful or criminal acts or purposes of their insured to escape their statutory obligation
I to satisfy the judgments of third parties. As the liability is statutory, there cannot be any terms or conditions in the insurance claim that would defeat the very protection granted by the statute on a third party.

[15] The learned High Court Judge was in agreement with the finding of the Sessions Judge in that the word "arising out of the use of the motor vehicle" as appear in s. 91(1) of the RTA 1987 connotes not only the actual driving of the vehicle but also the use of the vehicle on the road. As such the learned High Court Judge was in favour of attaching liability on the appellant being the insurer for the criminal acts of the insured against a third party in the course of the use of the motor vehicle that was insured with the appellant. The learned High Court Judge was of the considered view that there was nothing in the RTA 1987 that would effectively exempt the insurer from liability to pay a third party who suffers injury on the road as a result of the criminal act of the insured, in relation to the use by him of the insured vehicle.

At The Court Of Appeal

[16] At the outset we would like to state here that the central issue for determination in this appeal is ie, whether the insurer (appellant) in the instant case ought to be held liable to pay to the third party (respondent) whose injuries had been caused by the criminal use of the vehicle by the insured. Simply put, whether the use of the insured vehicle would cover the use of the same in a criminal act.

[17] The right of the respondent as a third party to approach the court for redress against the appellant, who itself is not a tortfeasor and with whom the respondent had no contractual relationship arises from statutory empowerment under s. 96 of the RTA 1987. The mechanism of s. 96 of the RTA 1987 operates thus: there is a statutory obligation created by s. 96 of the RTA 1987 on the part of the insurer (appellant) on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and as said earlier is an exception to the concept founded upon privity of contract.

[18] In order for the respondent to succeed in her claim under s. 96 of the RTA 1987 the requirements in respect of the insurance policy under s. 91(1) of the RTA must be fulfilled first. Section 91(1) of the RTA 1987 sets down the requirements in respect of policies, where policy of insurance must be a policy which:

> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
>
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.

A Provided that such policy shall not be required to cover:

(aa) liability in respect of death arising out of and in the course of his employment of a person insured by the policy ...; or

(bb) except in the case of motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a
B contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence ...; or

(cc) any contractual liability.

C **[19]** Provision (a) of s. 91(1) is a non-issue here. The problem lies with the fulfilment of proviso (b). Under the normal circumstances the respondent as a third party would have been able to institute her claim within the confines of the said provision. However this is not the situation here as learned counsel for the appellant's grouse had been very specific in that his client
D (the insurer) ought not to be held responsible to indemnify the respondent because the injuries caused to the respondent had been attributed to the criminal conduct of the insured. Such criminal conduct relating to the use of the motor vehicle that was insured by the appellant was not within the contemplation of the appellant when it had agreed to underwrite the policy
E to cover the insured's use of the motor vehicle.

[20] In short, the appellant's bone of contention is that the criminal act of the insured is not something caused by or arising out of the use of the motor vehicle. Learned counsel referred to the following cases of *Herbert v. Railway Passengers Assurance Co* [1938] 1 All ER 650, *Letchumi & Anor v. The Asia*
F *Insurance Co Ltd* [1972] 1 LNS 74, *Ramlah Abdullah v. Talasco Insurance Sdn Bhd & Anor* [2009] 3 CLJ 620, *Ahmad Sandara Lela Putera & Anor v. Queensland Insurance Co Ltd* [1974] 1 LNS 4 and *Tan Keng Hong & Anor v. Fatimah Abdullah & Ors* [1974] 1 LNS 166 in support of his proposition.

G **[21]** Learned counsel for the respondent took a diametrically opposed view on this issue in that the policy of insurance issued under s. 91 of the RTA covers criminal use of the motor vehicle within the words "arising out of the use of the motor vehicle" under s. 91(1)(b) of the RTA 1987. Learned counsel contended that the statutory provisions of s. 91(1) is clear as it imposes upon the appellant being the insurer the obligation of paying of the
H person who had obtained a judgment against the insured. Hence, learned counsel submitted that the appellant in this present appeal is obliged to pay the respondent who had obtained judgment against the insured.

[22] After giving our utmost consideration to the issue above, with the greatest of respect we are unable to accede to the contentions urged upon us
I by learned counsel for the appellant. We are much inclined to agree with the

proposition urged upon us by learned counsel for the respondent. Our reasons are thus: The pertinent words under s. 91(1)(b) would be, "**any liability which may be incurred** ... in respect of death of or bodily injury ... **caused by or arising out of the use of the motor vehicle**". (emphasis added)

[23] The crucial question here is whether the respondent's injuries were "caused by or arising out of" the use of the vehicle by the insured. If they were, the appellant is obliged by s. 96 of the RTA 1987 to satisfy the judgment obtained against the insured. In this regard as we have said earlier the appellant's grouse here being that the criminal act of the insured is not something caused by or arising out of the use of the motor vehicle.

[24] With respect we are unable to agree with this proposition. It cannot be said, with all fairness, that the wordings of the Act restricts the third party claimants rights only to any liability wherein the use of the vehicle is one within the contemplation of the insurer. We found support for our views based on the string of English cases which had the occasion to consider the wordings under scrutiny "any liability which may be incurred ... caused by, or arising out of the use of the motor vehicle" which appears under the English Road Transport Act *vide* s. 145 of the Road Traffic Act 1988, which is similar to our s. 91(1) of RTA 1987 which is reproduced as follows:

> Section 145. Requirements in respect of policies of insurance
>
> (1) In order to comply with the requirements of this Part of this Act, **a policy of insurance must satisfy the following conditions.**
>
> (2) The policy must be issued by an authorised insurer, that is to say, a person or body of persons carrying on motor vehicle insurance business in Great Britain.
>
> (3) Subject to subsection (4) below, the policy:
>
> (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road; and
>
> (b) must also insure him or them in respect of any liability which may be incurred by him or them under the provisions of this Part of this Act relating to payment for emergency treatment.

[25] First in the line of English cases we would like to discuss is the case of *Dunthorne v. Bentley And Others* [1996] RTR 428 *(Dunthorne)*. What happened in *Dunthorne* was this: Mrs Bentley the defendant in this particular case was driving her motor vehicle on a road one evening when she ran out of petrol. She parked at the side of the road and stood at the rear of the car. After about ten minutes she was seen by a colleague who stopped her car on the opposite side of the road. After some shouted conversation Mrs Bentley ran across the road and was struck and fatally injured by an oncoming vehicle

driven by the plaintiff, Mr Dunthorne. The plaintiff suffered serious head injuries in the collision and claimed damages against the administrators of Mrs Bentley's estate, who admitted her negligence. On 5 January 1994 judgment was obtained against the administrators of Mrs Bentley's estate. The insurance company was added as a party to the proceedings.

[26] The issue before the court was whether the accident arose out of Mrs Bentley's use of her car so that the insurers were liable for the plaintiff's injuries under the terms of the motor insurance policy issued to Mrs Bentley pursuant to s. 145(3)(a) of the Road Traffic Act 1988. The learned trial judge held that the accident arose out of Mrs Bentley's use of her car and, therefore the insurers were liable under Mrs Bentley's insurance policy for the plaintiff's injuries.

[27] The insurers appealed on the grounds *inter alia* that the learned judge erred in failing to find that the plaintiff's injuries were neither caused by nor arose out of Mrs Bentley's use of the motor vehicle which she had parked. The insurers also contended that the learned judge erred in failing to give the words "arising out of the use of the vehicle" the natural and ordinary meaning they should bear in the context of part V1 of the Road Traffic Act 1988.

[28] Rose LJ in dismissing the insurance company's appeal expressed his conclusion by stating that Mrs Bentley's running across the road was a negligent act which caused the plaintiff's injuries (as well as her own tragic death); that act was closely and causally connected with her use of the car; and therefore the plaintiff's injuries arose out of Mrs Bentley's use of the car, within the meaning of s. 145(3) of the Act of 1988.

[29] *Hardy v. Motor Insurers Bureau* [1964] 2 QB 745 *(Hardy)* is a case concerning a third party insurance claim against the insurer whereby the third party was injured by the criminal act of the insured use of the vehicle on the road. Lord Denning MR had ruled that such use of the insured vehicle must include cover for injuries caused to a third party by criminal acts committed by the insured. We would like to digress here a little to state that *Hardy*'s case was deliberated by the Sessions Court Judge as well as the High Court Judge in our instant case. In *Hardy*'s case the English Court of Appeal had the opportunity to scrutinise s. 203(3)(a) of the Road Traffic Act 1960 then (which is similar to the current s. 145(3)(a) of the Road Traffic Act 1988).

[30] The facts of *Hardy*'s case was this: The plaintiff, a security officer at a large metal works, sought to question the driver of a van bearing a stolen road fund licence by stopping the van in the road and asking the driver, who was a worker in the factory, to pull in. While the security officer was holding on to the open van door with his head inside, the driver drove off at a speed, dragging him along the road for some distance and causing bodily injury. The driver was prosecuted accordingly. The plaintiff then sought to recover

damages for his injuries, but as the driver was not insured, the plaintiff sought to recover from the defendants, the Motor Insurers' Bureau. The county judge held that the van driver must be presumed to have intended to injure the plaintiff and as such the plaintiff was entitled to the judgment. The Insurance Bureau appealed. In dismissing the appeal the English Court of Appeal held that s. 203(3)(a) of the Road Traffic Act 1960 required a policy of insurance covering liability to a third party arising from even an intentional criminal use of the vehicle on a road.

[31] The public policy consideration in *Hardy*'s case *(supra)* had recognised that the insured himself cannot benefit from compensation for injuries that may be sustained by him *via* his criminal conduct, but by some token, public policy would expect that an innocent third party must be protected by the insurance cover of the insured in such circumstances. In this regard we would like to cite a passage by Lord Denning MR in *Hardy*'s case which seems to us to summarise admirably the reasoning under scrutiny in the present appeal. Lord Denning MR held that:

> The policy of insurance, which a motorist is **required by statute** to take out, **must cover any liability which may be incurred by him** arising out of the use of the vehicle by him. It must, 1 think, be **wide enough to cover, in general terms, any use by him of the vehicle, be it innocent use or a criminal use,** or be it a murderous use or a playful use. A policy so taken out by him is good altogether according to its terms. Of course, if the motorist is intended from the beginning to make a criminal use of the vehicle – intended to run down people with it or drive it recklessly and dangerously and the insurers knew that that was his intention, the policy would be bad in its inception. No one can stipulate for iniquity. But that is never the intention when such a policy is taken out.
>
> ...
>
> The question arises only when the motorist afterwards makes a criminal use of the vehicle. The consequences are then these: if the motorist is guilty of a crime involving a wicked and deliberate intent, and he is made to pay damages to an injured person, he is not himself entitled to recover on the policy. But if he does not pay the damages, then the injured third party can recover against the insurers under sec. 207 of the RTA 1960; for it is a liability which the motorist, under statute, was required to cover. The injured third party is not affected by the disability which is attached to the motorist himself.
>
> (emphasis added)

[32] In *Gardner v. Moore and Another* [1984] 2 WLR 714 *(Gardner)*, the plaintiff suffered injuries as a result of being run down by a motor vehicle driven by the first defendant. The injuries sustained by the plaintiff were caused by the intentional criminal act of the first defendant who deliberately drove his vehicle on to the pavement where the plaintiff was walking and intentionally ran him down. The first defendant pleaded guilty to a criminal

charge under s. 18 of the Offences Against the Person Act 1861 of wounding the plaintiff with intent to cause him grievous bodily harm, and was sentenced to serve a term of imprisonment for three years. At the time of the accident the first defendant had not been insured by any relevant policy of insurance under Part VI of the Road Traffic Act 1972.

[33] The plaintiff issued a writ against the first defendant for damages for personal injuries and joined the Motor Insurers Bureau (Bureau) as second defendant, claiming that by virtue of an agreement dated 22 November 1972 between the Bureau and the Secretary of State for the Environment (MIB agreement) the Bureau was bound to indemnify the plaintiff in respect of any judgment that the plaintiff obtained against the first defendant. At the trial of the action the plaintiff was awarded damages against the first defendant and a declaration that the second defendant (Bureau) is liable to indemnify the plaintiff for the judgment against the first defendant. The second defendant appealed to the House of Lords.

[34] The House of Lords dismissed the second defendant's appeal. Lord Hailsham of St Marylebone LC quoted at length the reasoning postulated by the English Court of Appeal in *Hardy*'s case. The House of Lords in *Gardner* held that the judgment obtained by the plaintiff against the first defendant had been a judgment payable in respect of a liability incurred by the first defendant for damages for personal injury "caused by, or arising out of, the use of the first defendant's motor car within s. 145(3)(a) of the Road Traffic Act 1972, despite the fact that the use had been a criminal use.

[35] Eminent text book authors have also lent credence to the above proposition. Learned counsel for the respondent had highlighted to us an excerpt from the book titled "*The Law of Motor Insurance*" by S Santana Dass. The eminent author on the related issue before this court had opined at p. 230 of his book that:

> if a judgment has been entered against the insured/driver and he does not pay the judgment, the third party can enforce the judgment directly against the insurer under Section 96 of the RTA. Section 96 allows a direct action by the third party against the insurer "with respect to a matter which is required to be covered by a policy of insurance". The policy must cover any liability which may be incurred by the insured arising out of the use of the motor vehicle by him. Does the "use" cover "criminal use"? This question has been answered clearly by Lord Denning MR in *Hardy v. Motor Insurers' Bureau* [1964] 2 All ER 74.

[36] Applying the principles in the English cases discussed above and adopting the views of the text book author cited above we would conclude by saying that the phrase in s. 91(1)(b) of the RTA, any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle ...", would include the liability for damages arising from acts of a criminal nature. The

irresistible conclusion would be that the appellant is liable to pay the third party who had suffered injuries as a result of the use of the motor vehicle which is insured by the appellant regardless whether it was at the time used for a criminal purpose.

[37] The injuries suffered by the respondent in the instant case were caused by or arose out of the insured use of his motorcycle. The insured liability to the respondent falls within the ordinary meaning of the words used in s. 91(1)(b). The expression "use" must be interpreted to mean not only the act of driving of the vehicle but also having the use of the vehicle on the road. It cannot be said, with all fairness, that the Act restricts the right of the third party to make a claim arising out of the use of the vehicle in commission of a criminal act. Ascribing some other meaning to it to say that this does not cover the use of the vehicle in commission of a criminal act will defeat the very statutory protection accorded to the third party *vide* the RTA 1987 where one of the purposes of enacting the RTA 1987 was to make provision for protecting third party against risks arising out of the use of motor vehicle. The RTA 1987 long title reads "An Act to ... make provision for the protection of third parties against risks arising out of the use of motor vehicles".

[38] Perhaps it would be opportune for us to also highlight here that it is the insurer's mandatory duty to satisfy the judgment. The statutory provisions of s. 96(1) of the RTA 1987 is very clear. It imposes upon the insurer (the appellant, in this appeal) the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is affected in respect of any third party risk covered under the policy. In short, the appellant in the present appeal is obliged statutorily to pay the respondent who had obtained the judgment dated 15 March 2011 against the insured.

[39] The appellant as the insurer would only be able to avoid the payment obligation under the circumstances and conditions mentioned in sub-ss. 2 and 3 of s. 96 of the RTA 1987, that is to say, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void or unenforceable.

[40] Based on the facts, none of these conditions were fulfilled by the appellant (insurer) in the present case to exonerate its statutory obligations under the policy. That being the case, the judgment debt of the insured becomes judgment debt of the appellant (insurer) by virtue of s. 96(1) of the Road Transport Act 1987 (see case of *Pacific & Orient Insurance Co Bhd v.*

Muniammah Muniandy [2011] 1 CLJ 947). Similar sentiments were expressed by the learned Sessions Court Judge as upheld by the High Court Judge which we are in agreement with. The learned High Court Judge had this to say:

> [14] This court is of the considered view that the learned Sessions Court judge was correct when he ruled the way he did, as clearly there is a statutory obligation created by section 96 RTA 1987 on the part of the insurer (such as the appellant in this appeal) in being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the respondent third party. This duty to pay up is statutory in origin and is an exception to the concept founded upon privity of contract.

[41] Another point which merits our consideration is whether exception 3(a) can be relied upon by the appellant to prevent the respondent from enforcing the judgment. Sections 94 and 95 of the RTA 1987 prohibit an insurer from relying on certain terms in an insurance policy for the purposes of excluding liability. On the other hand a term or condition which does not come within the purview of ss. 94 and 95 may be legitimately relied upon by the insurer for the purposes of excluding liability under the policy when a claim is brought by a third party. The question now is whether exception 3(a) can be legitimately relied upon by the appellant to exclude liability. The answer to this question lies in s. 95(k) of the RTA 1987 itself. Section 95(k) of the RTA reads thus:

> (k) the motor vehicle being **used for a purpose other than the purpose stated in the policy,** shall, as respects such **liabilities as are required to be covered** by a policy under **paragraph 91(1)(b)**, be of **no effect** … (emphasis added)

[42] It is noteworthy to mention here that s. 95(k) of the RTA specifically states that an insurer cannot rely on any conditions which purports to restrict the insurance of the persons insured by reference to the matters set out therein *inter alia* that the motor vehicle was being used for a purpose other than the purpose stated in the policy. (see Santana Dass on *"The Law of Motor Insurance"*).

[43] Santana Dass in his book *"The Law of Motor Insurance"* analysed s. 95(k) of the RTA to mean:

> Under Section 95(k), any condition in the policy that excludes the liability of the insurer, if the vehicle is used for any purposes than for social, domestic, pleasure purposes e.g. racing, motor sports etc. will be ineffective and cannot be used by the insurer to exclude liability insofar as bodily injury or death claims are concerned. This should include use of the motor vehicle for unlawful purposes or acts as well. In any event, the law is that "criminal acts" of the insured in the use of the motor vehicle are insured under Section 91 and the insurers cannot have the liberty to

exclude this statutory requirement to insure against unlawful or criminal acts or purposes of their insured to escape their statutory obligation to satisfy the judgments of third parties.

We are in agreement with the views expressed by the learned author that by virtue of s. 95(k) of the RTA 1987, the insurer cannot impose such terms or condition on their insurance policy that would be contrary to RTA 1987 as was done in this case following the General Exceptions 3(a) of the insurance policy.

[44] In the final analysis, what is left for us to consider is whether appellate intervention is warranted in the instant case. In this regard it is our considered view the learned Sessions Court Judge and the learned High Court Judge had dealt with the very essence of the appellant's main grievance, namely that the insurance company ought to be held liable to pay the third party whose injuries had been caused by the criminal use of the insured vehicle on the road by the insured. The learned Sessions Judge and the High Court Judge had addressed their mind to the various provisions in the RTA 1987 which provisions had been correctly interpreted. We find there is no appealable error which warrants appellate intervention on accepted principles.

[45] To sum up, based on the statutory requirements of s. 96 and s. 91(1) of RTA 1987 and premised on the persuasive reasoning given by the English Courts in the cases we have cited in the preceding paragraphs, it would be mandatory for the insurer to pay the respondent following the judgment.

[46] We are of the considered view that the phrase in s. 91(1)(b) of the RTA 1987, "... any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle ..." would include the liability for damages arising from acts of a criminal nature. Therefore the appellant is liable to pay the respondent who had suffered injuries as a result of the use of the motor vehicle which was insured by the appellant regardless it was at the time used for a criminal purpose. Section 96 of the RTA clearly states the only two conditions where no sum would be payable by the insurer and they do not apply to the facts of this case. Further, Exception 3(a) relied on by the appellant as a defence is defeated by s. 95(k) of the RTA 1987.

[47] For the above said reasons, we dismiss the appeal with costs.